STATE OF MICHIGAN

COURT OF APPEALS

D & T EMERALD CREEK, INC.,

Plaintiff-Appellant,

v

ARLINGTON TRANSIT MIX, INC.,

Defendant-Appellee,

and

MACOMB CONTRACTING CORP. and GERLACH LANDSCAPING AND GRADING, INC.,

Defendants.

UNPUBLISHED
February 20, 1998

No. 192410
Macomb Circuit Court
LC No. 93-005190-NZ

Before: Fitzgerald, P.J., and Markey and J.B. Sullivan*, JJ

PER CURIAM.

The trial court granted summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant Arlington Transit Mix, Inc. ("Arlington") in plaintiff's negligence and breach of implied warranty claims. Plaintiff appeals as of right. Plaintiff also appeals the trial court's order denying its motion for leave to amend its complaint to allege fraud against Arlington. We affirm both orders.

First, plaintiff argues that the trial court committed error in granting summary disposition pursuant to MCR 2.116(C)(19) in Arlington's favor on plaintiff's negligence claim based upon the economic loss doctrine. We disagree.

In reviewing a trial court's decision regarding a motion for summary disposition brought pursuant to MCR 2.116(C)(10), this Court examines all relevant affidavits, depositions, admissions, and other documentary evidence and construes the evidence in favor of the nonmoving party. *Stevens v*

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Inland Waters, Inc, 220 Mich App 212, 214; 559 NW2d 61 (1996). We then determinewhether a genuine issue of material fact exists on which reasonable minds could differ. *Id*. This Court reviews de novo a trial court's grant or denial of a motion for summary disposition. *Id*. In opposing a motion for summary disposition under MCR 2.116(C)(10), the nonmoving party may not rely on mere allegations or denials in its pleadings but must set forth specific facts through affidavits or other permitted evidence to demonstrate that there exists a genuine issue for trial. MCR 2.116(G)(4). See *Roberson v Occupational Health Centers of America Inc*, 220 Mich App 322, 324-325; 559 NW2d 86 (1996). "Although summary disposition is not favored in a negligence action, summary disposition is appropriate where the plaintiff has failed to establish a prima facie case of negligence." *Richardson v Michigan Humane Society*, 221 Mich App 526, 528; 561 NW2d 873(1997).

We find that the trial court did not commit error requiring reversal in applying the economic loss doctrine to plaintiff's "negligence" claim. Plaintiff alleged in its complaint that it suffered economic damages, specifically the cost of replacing the road in question and loss of sales revenue, as a result of Arlington's alleged negligence. In dismissing plaintiff's negligence count against Arlington, the trial court stated that plaintiff's damages were purely economic, that its exclusive remedies were under the Uniform Commercial Code, and that plaintiff therefore could not state a valid negligence claim.

The Michigan Supreme Court in *Neibarger v Universal Cooperatives, Inc*, 439 Mich 512, 527-528, 537-538; 486 NW2d 612 (1992), held that where a plaintiff seeks to recover for economic loss caused by a defective product purchased for commercial purposes, the exclusive remedy is provided by the UCC. The Court in *Neibarger* adopted the "economic loss doctrine," which provides:

> "[w]here a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only 'economic' losses." This doctrine hinges on a distinction drawn between transactions involving the sale of goods for commercial purposes where economic expectations are protected by commercial and contract law, and those involving the sale of defective products to individual consumers who are injured in a manner which has traditionally been remedied by resort to the law of torts. [*Id*. at 520-521; footnotes omitted.]

Plaintiff contends that the trial court's reliance on *Neibarger* was misplaced because unlike the parties in *Neibarger*, plaintiff and Arlington did not have a direct contractual relationship. The Court in *Neibarger* did not directly address the claim that the UCC was inapplicable where there was no privity of contract between plaintiff and defendant. *Id*. at 537 n 31. Plaintiff contends that *Spence v Three Rivers Builders & Masonry Supply, Inc*, 353 Mich 120; 90 NW2d 873 (1958), is controlling because the Court in *Spence* permitted a plaintiff to bring a negligence claim against a manufacturer for damages to the plaintiff's property where there was no direct contractual relationship. *Id*. at 126-135. However, as the Court in *Neibarger* pointed out, *Spence* was decided before Michigan adopted the UCC. *Neibarger*, *supra* at 523 n 19.

This Court has considered the issue and held that the absence of privity does not preclude application of the economic loss doctrine. *Sullivan Industries, Inc v Double Seal Glass Co, Inc*, 192 Mich App 333, 342-344; 480 NW2d 623 (1991). The reliance on privity notions to ascertain whether

tort or commercial law applies serves only to blur the distinction between, and the applicability of, commercial law and tort law to economic losses. *Id*. at 343. "Instead, a more logical and conceptually manageable approach is to determine the type of loss a plaintiff is alleging." *Id*. at 343-344. Allegations of economic loss alone do not implicate tort law concerns with economic expectations. *Id*. at 344.

Considering this Court's holding in *Sullivan*, we find that the trial court was correct in applying the economic loss doctrine to plaintiff's negligence claim against Arlington despite a lack of contractual privity. Plaintiff's facts support a claim only for economic losses: the replacement cost for a new road and lost sales revenue.

Nevertheless, plaintiff has failed to demonstrate with specific facts that Arlington was negligent. Generally, negligence is conduct involving an unreasonable risk of harm. *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993). To establish a prima facie case of negligence, a plaintiff must demonstrate that (1) the defendant owed a duty to plaintiff, (2) the defendant breached that duty, (3) the defendant's breach of its duty was the proximate cause of the plaintiff's injuries, and (4) the plaintiff suffered damages. *Id.; Richardson*, *supra* at 528. Plaintiff alleged that Arlington had a duty to ensure that the materials used were of good and merchantable quality and not defective. Plaintiff has presented no facts to indicate that Arlington breached this duty. Moreover, plaintiff has not established any facts demonstrating that Arlington owed it any other duty. Accordingly, plaintiff's negligence claim against Arlington is without merit and summary disposition was properly granted.

Plaintiff also argues that the trial court committed error in applying the economic loss doctrine to its negligence claim where it had pleaded noneconomic damages in the form of harm to its reputation. We disagree.

Plaintiff has cited no case law or other authority for this argument. Therefore, the issue is abandoned. A party may not leave it to this Court to search for authority to sustain or reject its position. *Magee v Magee*, 218 Mich App 158, 161; 553 NW2d 363 (1996). In any event, plaintiff has not set forth specific facts outside of general allegations as required under MCR 2.116(G)(4) indicating that it suffered damages to its reputation. Accordingly, the trial court did not commit error in applying the economic loss doctrine to plaintiff's negligence claim.

Plaintiff also argues that the trial court committed error in dismissing its breach of implied warranty claim due to lack of contractual privity with Arlington. We agree. The trial court's ruling that privity was required in order to bring a breach of implied warranty claim was in error. The Michigan Supreme Court has eliminated the privity requirement in actions for breach of an implied warranty. *Jennings v Southwood*, 446 Mich 125, 132-133 n 5; 521 NW2d 230 (1994), citing *Spence*, *supra*.

This Court does not reverse a lower court's decision where it reached the right result for a wrong reason, however. *Hawkins v Dep't of Corrections*, 219 Mich App 523, 528; 557 NW2d 138 (1996). To establish breach of implied warranty, a plaintiff must show that the product left the manufacturer in a defective condition and that the defect caused the plaintiff's injuries. *Lagalo v Allied Corp*, 218 Mich App 490, 493; 554 NW2d 352 (1996). A plaintiff may premise a claim for solely

economic damages on a breach of warranty theory. *Id*. at 498-499, citing *Cova v Harley Davidson Motor Co*, 26 Mich App 602, 603-604; 182 NW2d 800 (1970).

Plaintiff alleged in its complaint that Arlington's products were defective. Plaintiff has not, however,established any facts as required under MCR 2.116(G)(4) demonstrating that the concrete supplied by Arlington was defective. Instead, plaintiff has alleged that the roadway cracked because not enough concrete was delivered and laid. An insufficient amount of concrete does not establish that the concrete Arlington delivered was defective. In other words, plaintiff has not demonstrated that the concrete itself caused its alleged damages. Accordingly, the trial court's order granting summary disposition on plaintiff's breach of implied warranty claim was also proper.

Plaintiff also argues that the trial court committed error in denying its motion to amend its complaint in order to allege fraud on the part of Arlington. We disagree.

A trial court should freely grant leave to amend if justice so requires. MCR 2.118(A)(2). See *Jenks v Brown*, 219 Mich App 415, 420; 557 NW2d 114 (1996). Leave to amend should be denied only for particularized reasons, such as undue delay, bad faith, or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or where amendment would be futile. *Id*. This Court reviews grants and denials of motions for leave to amend pleadings for an abuse of discretion. *Id*.

In allegations of fraud or mistake, the circumstances constituting fraud or mistake must be stated with particularity. MCR 2.112(B)(1). The elements constituting actionable fraud or misrepresentation are well settled:

> The general rule is that to constitute actionable fraud it must appear: (1) that defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. [*Kassab v Michigan Basic Property Ins Ass'n*, 441 Mich 433, 442; 491 NW2d 545 (1992); citations omitted.]

Plaintiff argues that the September 25, 1995 affidavit of Vincent DiLorenzo indicates that Ken Abraham of Arlington made false statements at the time the work was completed. Plaintiff also argues it established that Arlington provided delivery tickets showing 600 cubic yards of concrete were delivered to defendant Macomb Contracting, but that the actual amount of concrete delivered was only 300 cubic yards.

We find that the elements of fraud or misrepresentation cannot be inferred from the facts plaintiff established. The DiLorenzo affidavit simply sets forth that Abraham requested plaintiff's payment of $30,000 for the concrete be made directly to Arlington instead of to defendant Macomb Contracting Corp. Even assuming that only 300 cubic yards of concrete were delivered, plaintiff has not established the requisite elementof fraud that Arlington intentionally or recklessly made a false statement or representation to it. An amended complaint containing a claim of fraud would have been futile.

Accordingly, the trial court did not abuse its discretion in denying plaintiff's motion to amend its complaint.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Joseph B. Sullivan